IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1467 OF 1990.

1. Godrej Soaps Ltd.
   Pirojshanagar,
   Eastern Express Highway,
   Vikhroli, Bombay- 400 079.

2. Vasant Narayan Gogate,
   Senior Vice President (Finance)
   & Secretary,
   C/o. Godrej Soaps Ltd.,
   Pirojshanagar,
   Eastern Express Highway,
   Vikhroli, Bombay- 400 079. ... Petitioners.

V/s.

1. The State of Maharashtra,
   (Service through the Govt.
   Pleader, High Court (O.S.)
   Bombay.

2. The Commissioner of Sales Tax,
   Vikrikar Bhavan, Mazgaon,
   Bombay- 400 010.

3. Assistant Commissioner of
   Sales Tax (Assessment),
   48, LMNT Ward, Unit-II,
   Konkan Bhavan, New Bombay. ... Respondents.

P.S.Jetly for the petitioners.

S.K.Nair, A.G.P. for the respondents.

CORAM : V.C.DAGA AND J.P.DEVADHAR, JJ.

RESERVED ON : 2nd September 2005.

PRONOUNCED ON : 28th October 2005.

JUDGMENT :

. The petitioners, M/s.Godrej Soaps Ltd., Mumbai have filed this petition under Article 226 of the Constitution of India to challenge the amendment to section 2(17) of the Bombay Sales Tax Act, 1959 ("Act" for short), by Maharashtra Act No.IX of 1989 ("Act No.IX of 1989) with retrospective effect i.e. with effect from 1st January, 1960, contending it to be illegal, invalid and ultra vires the constitution of India.

Factual Matrix :
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2. The factual matrix depicts that petitioner No.1 is a public limited company engaged in manufacturing and selling of soaps, toiletries and fatty acids, etc. The petitioners purchase expeller groundnut oil and soyabean oil from other dealers in Maharashtra; who are registered under section 22 of the Act. the petitioners also purchase such oil from dealers located in different States of the country.

3. According to the petitioners, the oil so purchased is edible. It can be used for human consumption without refining. However, with a view to find out a better market for the oil, petitioners carry on activity of refining of oil only to put the oil purchased in a more acceptable condition. The petitioners, during the calender year 1981, under legal advice based on the judgment of the Supreme Court in the case of **Tungabhadra Industries v. Commercial Tax Officer, Kurnool**, (1960) 11 STC 827, that the process of refining oil does not amount to manufacture, did not pay tax on the sale of the oil which was purchased from the registered dealers in the State of Maharashtra; on which tax was paid at the time of purchase because they were entitled to claim resale without payment of tax by virtue of section 8 of the Act.

4. The petitioners also stated that from the year 1981 onwards they have been claiming resale under section 8(ii) of the Act in respect of unrefined oil purchased by them from the registered dealers in the State of Maharashtra and which has been sold after refining. The assessing authority did not accept this claim and the petitioners were required to file appeals under section 55 of the Act to the appellate authority. The petitioners' assessments upto and including the year ending on

30th June, 1986 have been completed by the assessing authority; wherein their claim for resale has not been accepted. The petitioners have, therefore, filed appeals for these periods, which are pending for hearing and final disposal before the appellate authority.

5. The petitioners stated that the Special Bench of the Maharashtra Sales Tax Tribunal at Bombay ("Tribunal" for short) by its order dated 22nd August, 1988 in Appeal No.62 of 1980 passed in the case of the petitioners and other connected cases held that the activity of refining of crude soyabean oil, sunflower oil and/or rape seed oil was not a process of "manufacture" within the meaning of section 2(17) of the Act. In view of this decision, petitioners claimed for set off under rules 42 and 43 of the Bombay Sales Tax Rules, 1959 ("BST Rules" for short) for the assessment period from 1973 to 1980 and resale under section 8(ii) of the Act for the assessment period from 1981 to 1988-89 was upheld.

6. The petitioners stated that respondent No.2 also filed reference application being Reference Application No.22 of 1989; wherein the questions of law were sought to be referred to this Court under section 61 of the Act. All the

questions framed by Revenue for reference centers around the issue: whether or not the process of refining oil amounts to manufacture.

7. The reference application is still pending before the Tribunal for final disposal. During the pendency of the reference application, Explanation-II came to be inserted with retrospective effect from 1st January 1960 by the Act No.IX of 1989 in section 2(17) of the of the Act to the effect that "for the purpose of this clause, refining of oil shall be deemed to be manufacture".

8. The petitioners stated that by the said retrospective amendment to section 2(17) of the Act, the claim of resale under section 8(11) of the Act made by the petitioners became inadmissible. The returns filed by the petitioners are rendered false and untrue because of the retrospective effect given to the amendment.

The Legislation :
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9. Before proceeding to recapitulate the rival submissions, it may be proper to read the relevant provisions for a break up of the statutory limbs.

10. The provisions of section 8 to the extent relevant for the purpose of deciding this petition are:

Section 8:

Single point levy of sales tax on goods specified in Schedule C.

There shall be levied a sales tax on the turnover of sales of goods specified in Schedule C at the rate set out against each of them in column 3 thereof, but after deducting from such turnover, -

(i) resales of goods on the purchase of which the dealer is liable to pay purchase tax under section 14;

(ii) resales of goods, purchased by the dealer on or after the appointed day from a Registered dealer, otherwise than on a declaration furnished under section 11 or 12, if the requirements of section 12A are satisfied; (Provided that, resales of goods purchased by the dealer from a registered dealer during the period commencing on the 1st July 1981 and ending on the day immediately preceding the date of commencement of the Maharashtra Tax Laws (Levy and Amendment) Act, 1988, on a declaration furnished under section 8A shall not be deducted from such turnover).

(iii) resale of goods purchased by the dealer on or after the appointed day from a dealer liable to pay tax under section 4, if a certificate as provided in sub-section (2) of section 12A is furnished; and

(iv) sales of goods or resales of goods to which clause (ii) or clause (iii) does not apply, to an Authorised dealer, a Recognised dealer or a Commission agent holding a Permit, who purchases on behalf of a principal upon such dealer or Commission agent, as the case may be, furnishing a declaration as provided in Section 12).

Section 2(17) of the Act prior to its amendment by

the Act No.IX of 1989 read as under:

Clause (17) of section 2 :

"manufacture" with all its grammatical variations and cognate expressions, means producing, making, extracting, altering, ornamenting, finishing or otherwise processing, treating, or adapting any goods; but does not include such manufactures or manufacturing processes as may be prescribed;

Explanation - For the purposes of this clause, the cutting, sawing, shaping, sizing or hewing of timber, shall be deemed to be manufacture.

Section 2(17) to the Act, after its amendment by Act

No.IX of 1989, reads as under:

Clause (17) of section 2 :

....

Explanation - ....

Explanation-II: For the purpose of this clause refining of oil shall be deemed to be manufacture.

Grounds of Challenge :

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11. The petitioners contend that Explanation-II inserted with a view to amend section 2(17) of the Act is beyond legislative competence of the State of Maharashtra in so far as it operates retrospectively because; (i) it retrospectively

imposes a fresh levy for the first time; (ii) its retrospective operation for 29 years is not reasonable and it infringes Articles 14 and 19(1)(g) of the Constitution and (iii) there is discrimination vis-a-vis the petitioners and others who carry on identical/similar activity by virtue of rule 3 of the Act, which deals with process not includible in manufacture. There is no reasonable nexus with the object sought to be achieved so far as the retrospective insertion of Explanation-II is concerned.

Submissions :
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12. At the outset, we may mention that Mr.Jetly, learned counsel for the petitioners restricted his challenge to the amended provision to the extent it operates retrospectively. He, relying on the grounds of challenge set out hereinabove, submits that an explanation cannot retrospectively enlarge the scope of the main clause. In this connection he invited our attention to the Maharashtra Tax Laws (Levy and Amendment) Act, 1994; whereby clause (17) of section 2 was substituted and the explanation was included in the definition itself.

13. Mr.Jetly further submits that a six judge Bench of the Supreme Court in the case of **Tungabhadra Industries Ltd.** (supra) held that hydrogenated groundnut oil commonly called Vanaspati is groundnut oil within the meaning of rule 18(2) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939. According to him, the case of the petitioners is squarely covered by this decision. He submits, this judgment has been applied and followed in several cases, viz., **Panchalingal Carbonic Gas Pvt.Ltd. v. State of Andhra Pradesh**, (2005) 141 STC 161 (AP)(FB); **Raj Solvex Ltd. v. Addl.Commissioner, Commercial Taxes**, (2003) 133 STC 333 (Raj)(TT); **Teejan Beverages Ltd. v. State of Kerala**, (2003) 131 STC 538 (Ker.); **C.S.T. v. Oil Processors Pvt.Ltd.**, (1998) 108 STC 44 (Bom.); **New Nagpur Copra Industries v. The State of Maharashtra**, (1985) 60 STC 380 (Bom.).

14. Mr.Jetly submits that the subsequent decision of the Supreme Court in **B.P.Oil Mills v. Sales Tax Tribunal and others**, (1998) 111 STC 188 has overlooked the import of its earlier decision in the case of **Tungabhadra Industries Ltd.** (supra). He submits that the decision the Apex Court in the case of **Tungabhadra Industries Ltd.** (supra) will be binding and will have precedence over **B.P.Oil Mills case** (supra). In support of his submission, he

relied upon the decision of the Apex Court in **Pradip Chandra Parija v. Pramod Chandra Patnaik**, 2002 (144) ELT 7 (SC); with various other decisions of various High Courts, viz., in the case of **State of Andhra Pradesh v. Balajee Audio & video Co.**, (2005) 140 STC 73 (AP) and **Ushodaya Enterprises Ltd. v. Commissioner of Commercial Taxes**, (1998) 111 STC 711 (AP)(FB); decision of Calcutta High Court in **Jindal (India) Ltd. v. Asst.Commissioner, Commercial Taxes**, (2004) 136 STC 492 (Cal); and decision of the Madras High Court in **C.I.T. v. Sundaram Industries Ltd.**, (2002) 253 ITR 396 (Mad).

Per Contra :
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15. Mr.Nair, learned "A" Panel Counsel appearing for the respondents submits that the Special Bench of the Tribunal for the first time in Appeal No.62/1980 decided on 22nd August, 1988 had held in the petitioners' case that the activity of "refining of crude soyabean oil" is not a manufacturing activity. In the assessment orders passed in the case of the petitioners, the activity was held as manufacturing activity and resale claim was disallowed. In his submission, since 1961, the departmental authorities were treating such activity as "manufacture". According to him, the assessments of most of the dealers doing activity of refining of

the oil were held as manufactures. He submits that in view of the decision of the Special Bench of the Tribunal, substantial amount would have been required to be refunded. In the circumstances, amendment to section 2(17) of the Act by Act IX of 1989 was necessary with retrospective effect.

16. Mr.Nair further submits that consistent view of the Government was that activity of refining of oil is nothing but a manufacturing activity, as such amendment sought to be challenged is nothing but a clarificatory amendment as such retrospectivity given to it is justified. In this view of the submission, he tried to justify the retrospectivity of the amendment.

17. Mr.Nair, to justify his submission, placed reliance on the speech delivered by the Finance Minister of the Government of Maharashtra in Legislative Assembly on 10th March, 1989 while introducing budget estimates for the year 1989-90; wherein the Finance Minister said as under:

> " Refining of vegetable oil has all along been treated as manufacture, attracting 4 per cent tax under the sales tax law. This well established procedure has recently been upset by a decision of the Sales Tax Tribunal holding that refining of sunflower oil would not amount to manufacture. Since tax has been collected for many years now on such refining of oil and the judgment has

serious revenue implications, SI propose to make an explicit statutory retrospective amendment clarifying that refining of oil is a manufacturing process.

18. Mr.Nair further submits that retrospective effect was required to be given from 1st January, 1960 as the scheme for levy of tax was changed from 1960. Since that date consistent view of the Government was that refining process of oil was a manufacturing activity. He pointed out that the Tribunal had also taken a similar view on the basis of unamended definition of the word "manufacture" in S.A.No.1978 of 1974 (**Kisangopal Shrikisandas Domani v. State of Maharashtra**) decided on 28th February, 1975 and S.A.No.53/1976 (**Rajini Oil Industries v. State of Maharashtra**) decided on 24th September, 1978.

19. Mr.Nair submits that because of the decisions of the Tribunal, the assessee doing refining of oil must have included incidence of tax liability while fixing the sale price of the oil. According to him, normally, incidence of tax liability is passed on to the customers. No assessee will pay tax from his pocket. There is no statutory bar for passing on the same to the customers. He, thus, submits that this aspect of the matter was also taken into consideration while

giving retrospective effect to Explanation-II. According to him, merely because retrospective effect is given for 29 years will not make the law void or illegal. Inordinately long retrospective effect given to the provision by itself does not make that provision unconstitutional. That is how Mr.Nair tried to justify the retrospectivity of the legislation with effect from 1st January, 1960 on certain justifiable grounds referred to hereinabove.

20. Mr.Nair placed reliance on various judgments of the Apex Court, viz., **B.P.Oil Mill Ltd. v. Sales Tax Tribunal & ors.** [(1998) 111 STC 188 (SC)]; **Tilak Chand Prasan Kumar & Anr v. State of U.P. & ors.** [(1973) 31 STC 179 (SC)]; **Ujagar Prints v. Union of India & ors.** [74 STC 401]; **M/s.Krishnamurthi & Co. v. State of Madras & anr.** [(1973) 2 SCR 54]; and **M/s.Misrilal Jain v. State of Orissa & anr.** (AIR 1977 SC 1686) in support of his submissions. He, thus, prayed for dismissal of the petition holding it to be without any substance.

The Issue :
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21. The main issue involved in this petition is: whether retrospective effect given to section 2(17) of the Act as amended by the Act IX of 1989, which though came on the Statute Book on 1st April,

1989 but with effect from 1st January, 1960; is valid and legal.

Determination of Issue :

22. Having heard learned counsel for the petitioners, we, at the outset, must mention that the restricted challenge; restricted to the retrospectivity of the amendment presupposes or is pregnant with an admission, on the part of the petitioners, that process of refining could be termed as "manufacture" by legislative device but cannot be with retrospective effect. It is, therefore, not necessary for us to examine legislative competence to enact Amending Act in question. On this aspect of the matter, there is no serious dispute between the parties. What is required to be examined is whether or not the process of refining of oil has been brought within the purview of word "manufacture" for the first time by virtue of the impugned amendment and whether or not the retrospective effect given to the amending provision is justified.

23. Before adverting to the above questions, it is necessary to consider the circumstances leading to the amendment to section 2(17) of the Act with retrospective effect, keeping in mind the rival

submissions advanced by learned counsel appearing for the rival parties.

24. It is not in dispute that for a considerable long time judicial view of the Tribunal was that the crude cotton seeds oil washed with caustic soda to obtain refined cotton seed oil did amount to "manufacture" within the meaning of unamended section 2(17) of the Act [see **Kisangopal Shrikisandas case** (supra)]. It is also not in dispute that for a considerable long time it was the judicial view that the crude oil and washed oil are two different commercial commodities [see **Rajani Oil Industries** (supra)].

25. In S.A.No.53/1976, the then Fourth Bench of the Tribunal for the first time in the year 1978 formed a view that the decision given by the Tribunal in the case of **Rajani Oil Industries** (supra); **M/s.Kisangopal Shrikisandas case** (supra); and **M/s.Vengoils Limited v. State of Maharashtra** (Appeal No.100 of 1980) decided on 18th January, 1982 required reconsideration in the light of the decision of the Apex Court in the case of **Tungabhadra Industries v. Commercial Tax Officer**, (1960) 11 STC 827 and decision of this Court in **Commissioner of Sales Tax v. Dunken Coffee Manufacturing Co.**, (1975) 35 STC 493. This,

ultimately, led to the reference to a Special Bench; wherein the petitioners along with other assessees were parties to the proceedings.

26. The Special Bench after taking detailed survey of various judgments of the Apex Court and applying the test enunciated by the Apex Court as well as by this Court reached to the conclusion that the activity of the assessees like petitioners of refining of crude/soyabean oil, crude/sunflower oil or crude rape-seed oil was not a process of "manufacture" within the meaning of section 2(17) of the Act. However, the State Government entertained an opinion that this view of the Tribunal is contrary to the legislative mandate and likely to create serious revenue implications. The Government, therefore, thought it fit to amend section 2(17) by introducing Explanation-II in the said provision with retrospective effect.

27. Let us now turn to the legal principles affirming the legislative power to amend with retrospective effect.

28. Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to "explain" a former statute, the subsequent statute has relation back to the time when the prior

Act was passed. The rule against retrospectivity is inapplicable to such legislations as are explanatory and declaratory in nature. A classic illustration is the case of **Attorney General v. Pougett**, (1816) 2 Price 381 : 146 ER 130 (at p.392). By a Customs Act of 1873 (53 Geo. 3, c.33) a duty was imposed upon hides of 9s 4d, but the Act omitted to state that it was to be 9s 4d per cwt., and to remedy this omission another Customs Act (53 Geo. 3, c.105) was passed later in the same year. Between the passing of these two Acts some hides were exported, and it was contended that they were not liable to pay the duty of 9s 4d per cwt., but Thomson, C.B., in giving judgment for the **Attorney General**, said: (ER p.134)

> " The duty in this instance was, in fact, imposed by the first Act; but the gross mistake of the omission of the weight, for which the sum expressed was to have been payable, occasioned the amendment made by the subsequent Act: but that had reference to the former statute as soon as it passed, and they must be taken together as if they were one and the same Act." (Price at p.392)

29. Maxwell states in his work on Interpretation of Statutes (12th Edn.) that the rule against retrospective operation is a presumption only, and as such it "may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it" (p.225). If the dominant intention of the legislature can be clearly

and doubtlessly spelt out, the inhibition contained in the rule against perpetuity becomes of doubtful applicability as the "inhibition of the rule" is a matter of degree which would "vary secundum materiam" (p.226). Sometimes, where the sense of the statute demands it or where there has been an obvious mistake in drafting, a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act (p.231).

30. Keeping the above principles in mind, let us consider and compare the original unamended definition of the word "manufacture" appearing in section 2(17) to examine justification in favour of retrospectivity. The definition of the word "manufacture" which still continues to be an inclusive definition which says that manufacture includes with all its grammatical variations and cognate expressions, means producing, making, extracting, altering, ornamenting, finishing or otherwise processing, treating, or adapting any goods but does not include such manufacture or manufacturing processes as may be prescribed. Prescribed means prescribed under Rules. By way of amendment what is added is an Explanation-II referred to hereinabove and impugned in this petition to the extent it has retrospective effect.

31. As a matter of fact, on behalf of Revenue, it was consistently urged that process of refining of oil was essentially manufacturing process inasmuch as as a result of this process a new substance known to the market is brought into being. In support of this submission several judgments were relied upon by the Revenue. Though it is not necessary to refer to all of them, one of them; which is directly on the point needs to be noticed.

32. In **Union of India v. Delhi Cloth & General Mills Co.Ltd.**, (1963) Supp. 1 SCR 586 : AIR 1963 SC 791, the Apex Court was concerned with the question "whether manufacture of "refined oil" from raw materials undertaken by the manufacturers of vegetable products known as vanaspati was liable to excise duty. The manufacturers purchased groundnut and till oil from open markets and the oil thus purchased by them were subjected to different process in order to turn these into vanaspati. The contention of the assessees was that at no stage they produced any new products which could come within the items described in the Schedule as "vegetable non-essential oils, all sorts, in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power". The contention of the Revenue was that the

manufacturers, in the course of manufacture of vanaspati which was a vegetable product from raw groundnut and til oil, brought into existence what is known in the market as "refined oil" after carrying out some process with the aid of power and it fell within the description of "vegetable non-essential oils" and as such was liable to duty. And, in that context, it was pointed out by the Apex Court that excise duty was a duty on the manufacture of goods and not on sale. after referring to the arguments of the respective parties, Apex Court noted at page 596 of the report (p.794 of AIR 1963 SC), the contention on behalf of the Revenue that manufacture was complete as soon as by the application of one or more processes, the raw material underwent some change. It further stated:

> "To say this is to equate 'processing' to 'manufactured' and for this we can find no warrant in law. The word 'manufacture' used as a verb is generally understood to mean as 'bringing into existence a new substance' and does not mean merely 'to produce some change in a substance', however, minor in consequence the change may be. The distinction is well brought about in a passage thus quoted in Permanent Edition of Words and Phrases, vol.26, from an American judgment. The passage runs thus:
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> > 'Manufacture' implies a change, but every; change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different

> article must emerge having a distinctive name, character or use."

33. Hence, according to this decision of the Apex Court, if a new substance is brought into existence or if a new or different article having a distinctive name, character or use results from particular processes, such process or processes would amount to manufacture. This viewpoint has been reiterated in numerous decisions.

34. The Constitution Bench of the Apex Court in the case of **Shyam Sunder v. Ram Kumar**, (2001) 8 SCC 24 has held:

> " Ordinarily when an enactment declares the previous law, it requires to be given retroactive effect. The function of a declaratory statute is to supply an omission or to explain a previous statute and when such an Act is passed, it comes into effect when the previous enactment was passed. The legislative power to enact law includes the power to declare what was the previous law and when such a declaratory Act is passed, invariably it has been held to be retrospective. Mere absence of use of the word 'declaration' in an Act explaining what was the law before may not appear to be a declaratory Act but if the court finds an Act as declaratory or explanatory, it has to be construed as retrospective."

35. In **Bengal Immunity Co. Ltd. v. State of Bihar**, (1955) 2 SCR 603 : AIR 1955 SC 661, Heydon case was cited with approval. The Apex Court said:

> "It is a sound rule of construction of a statute firmly established in England as far as back as 1584 when Heydon case was decided that-
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> 1st. What was the common law before the making of the Act.
>
> 2nd. What remedy Parliament hath resolved and appointed to cure the disease of the Commonwealth, and
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> 4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

36. In **Allied Motors (P) Ltd. v. C.I.T.**, (1997) 3 SCC 472, certain unintended consequences flowed from a provision enacted by Parliament. There was an obvious omission. In order to cure the defect, a proviso was sought to be introduced through an amendment. The Court held that literal construction was liable to be avoided if it defeated the manifest object and purpose of the Act. The rule of reasonable interpretation should apply.

> " A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be rad into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole."

37. In the case of **Jawaharmal v. State of Rajasthan**, AIR 1966 SC 764, the Apex Court held:

> "We have already stated that the power to make laws involves the power to make them effective prospectively as well as retrospectively and tax laws are no exception to this rule. So, it would be ideal to contend that merely because a taxing statute purports to operate retrospectively, the right of the citizen taxed under art. 19(1)(f) or (g). It is true that cases may conceivably occur where the court may have to consider the question as to whether excessive retrospective operation prescribed by a taxing statute amounts to the contravention of the citizens' fundamental right; and in dealing with such a question, the court may have to take into account all the relevant and surrounding facts and circumstances in relation to the taxation."

38. In the case of **Assistant Commissioner of Urban Land Tax v. Buckingham & Carnatic Co.Ltd.**, (1970) 75 ITR 603 (SC), it was observed:

> "It is contended on behalf of the petitioners that the retrospective operation of the law from July 1, 1963, would make it unreasonable. We are unable to accept the argument of the petitioners as correct. It is not right to say as a general proposition that the imposition of tax with retrospective effect per se renders the law unconstitutional. IN applying the test of reasonableness to a taxing statute, it is of course a relevant consideration that the tax is being enforce with retrospective effect but that is not conclusive in itself."

39. In the case of **Krishnamurthi & Co. v. State of Madras**, (1973) 31 STC 190, the Apex Court observed:

> "The object of such an enactment is to remove and rectify the defect in phraseology or lacuna of other nature and also to validate the proceedings, including realisation of tax, which have taken place in pursuance of the earlier enactment which has been found by the court to be vitiated by an infirmity. Such an amending and Validating Act in the very nature of things has a retrospective operation. Its aim is to effectuate and carry out the object for which the earlier principal Act had been enacted. Such an amending and Validating Act to make 'small repairs' is a permissible mode of legislation and is frequently resorted to in fiscal enactments."

40. Similar observations have been made by the Apex Court in the case of **Hira Lal Rattan Lal v. S.T.O.**, (1973) 31 STC 178 at p.186:

> " A feeble attempt was made to show that the retrospective levy made under the Act is violative of art. 19(1)(f) and (g). But we see no substance in that contention. As seen earlier, the amendment of the Act was necessitated because of the legislature's failure to bring out clearly in the principal Act its intention to separate the processed or split pulses from the unsplit or unprocessed pulses. Further, the retrospective amendment became necessary as otherwise the State would have to refund large sums of money."

41. Having taken survey of the law laid down by the Apex Court from time to time; some of which are referred to hereinabove, we may venture to add that clarificatory amendment to the fiscal legislation with retrospective effect is usually

held not to be unreasonable or arbitrary. In the case of any validating Act, the intention of the legislature is generally made sufficiently clear in the section or in the Act which is declared invalid on account of some flaw or defect which is within the competence of the legislature. The clarificatory amendment, it may be observed, do not in fact have the effect of imposing a fresh tax with retrospective effect. They only clarify the levy which was already imposed. There is in effect and substance no imposition of any new tax for the earlier years by virtue of the retrospective operation and the retrospective operation merely validates the levy already imposed and possibly collected.

42. Let us now consider the reasonableness of the retrospective part of the amendment in question.

43. Imposition of sales tax by legislation permits the dealers to pass on the liability on the customers. In other words, the Sales Tax Legislation permits recovery of tax from the subjects. It is well recognised that the tax may be recovered retrospectively. It is also well settled that recovery of tax by itself would not be an unreasonable restriction on right to carry on business. It was sought to be urged, however, that

unreasonable restrictions would be there because of the retrospectivity. The power of the Legislature to make retrospective legislation including fiscal legislation is well-settled [see **Krishnamurthi & Co. case** (supra)] Such legislation per se is not unreasonable. There is no particular feature of this legislation which can be said to create any unreasonable restriction upon the petitioners.

44. The view the Apex Court has taken of the expression "manufacture", the concept of process being embodied in certain situations in the idea of manufacture, the impugned legislation has done nothing except to make "small repairs" and that is a permissible mode of legislation. In 73rd volume of Harward Law Review, p.692 at p.795, referred by the Supreme Court with approval in **Empire Industries Ltd. v. Union of India**, (1986) 162 ITR 846, it has been stated as follows:

> "It is necessary that the Legislature; should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called 'small repairs'. Moreover, the individual who claims that a vested right has arisen from the defect is seeking a windfall since had the Legislature's or administrator's action had the effect it was intended to and could have had, no such right would have arisen. Thus, the interest in the retrospective curing of such a defect in the administration of government outweighs the individual's interest in benefiting from the defect..... The court has been

> extremely reluctant to override the legislative judgment as to the necessity for retrospective taxation, not only because of the paramount governmental interest in obtaining adequate revenues, but also because taxes are not in the nature of a penalty or a contractual obligation but rather a means of apportioning the costs of government among those who benefit from it."

45. The impugned legislation does not act harshly. There is no scope for arbitrariness. It is contended on behalf of the petitioners that they are carrying on only a processing activity not amounting to manufacture. Section 2(17), prior to its amendment, defined "manufacture" with all its grammatical and variations and cognate expressions, means producing, making, extracting, altering, ornamenting, finishing or otherwise processing, treating, or adapting any goods; but did not include such manufactures or manufacturing process as may be prescribed. What is excluded by rule 3 is a minor process which does not result in change of altogether a different marketable commodity. But so far as the process of refining or extracting some crude material therefrom was all the while treated as manufacturing process. Considered from this aspect and in the context of the earlier judgments of the Tribunal in the case of **Kisangopal Shrikisandas case** (supra) and others referred to hereinabove, there is no injustice or hardship to

the petitioners or the manufacturers or the refiners of the oil.

46. At this juncture, it will not be out of place to mention that the very same question whether definition of "manufacture under section 2(e-1) of the U.P.Trade Tax Act, 1948 envisages processing was raised before the Allahabad High Court in the case of **B.P.Oil Mills Ltd.** (supra); wherein it was held that where any commodity is subjected to a process or treatment with a view to market it; it would amount to processing. Therefore, the nature and extent of the process to which crude oil was subjected to make it refined oil was a subject matter of challenge before the Allahabad High Court. The High Court brought the latter within the meaning of the expression "goods manufactured" in section 3(3)(b)(iii) of the U.P.Trade Tax Act. A dealer who had purchased crude oil on paying tax on the purchase thereof and converted it into refined oil was held liable to pay tax on the sale of the refined oil. Correctness of the said judgment was also tested before the Apex Court at the instance of the assessee; wherein the submissions were made that the assessees were not liable to pay tax on sale of refined oils for even after refinement it continues to retain its basic character as oil. According to the petitioner therein, mere processing

of the crude oil for its conversion to refined oil, could not be said to be "manufacture" of new goods so as to make the assessee liable for tax thereupon under section 3(3)(b)(iii) of the U.P.Trade Tax Act. In support of the contentions, the assessees had relied upon the judgments of the Apex Court in the case of **Tungabhadra Industries Ltd.** (supra); **Sterling Foods v. State of Karnataka**, (1986) 63 STC 239 : (1986) 3 SCC 469; and **State of Maharashtra v. Shiv Datt & Sons**, (1992) 84 STC 497 : (1993) Supp 1 SCC 222.

47. In response, the Revenue had submitted that the assessees were liable to pay tax on the refined oil inasmuch as the meaning of the word "manufacture" in section 2(e-1) clearly envisaged any sort of processing. Therefore, it was contended that the question whether the crude oil maintained its character as oil even after refinement was redundant.

48. The Apex Court while dealing with the aforesaid rival submissions advanced before it, held that the judgment in **Tungabhadra Industries Ltd.** (supra) did not have any application to the facts of the case as the sole question fell for consideration was: whether consequent upon its conversion to hydrogenated oil by improving its quality groundnut

oil lost its identity of raw groundnut oil. According to the Supreme Court, the controversy in the case of **Tungabhadra Industries Ltd.** (supra) centered around the interpretation of "groundnut oil" appearing in the Madras General Sales Tax (Turnover and Assessment) Rules, 1939. According to the Supreme Court, neither the expression "manufacture" nor the expression "processing" directly came up for interpretation in that case.

49. The Apex Court in the above case, while dealing with **Sterling Foods case** (supra), observed that the question that was arose for determination was whether shrimps, prawns and lobsters subjected to processing like cutting of heads and tails, peeling, deveining, cleaning and freezing cease to be the same commodity and become a different commodity within the meaning of section 5 of the Central Sales Tax Act, 1956. While answering this question, the Apex Court applied the "commercial parlance" test and relied upon its earlier judgment in **Deputy Commissioner of Sales Tax (Law) v. Pio Food Packers**, (1980) 46 STC 63 (SC) : (1980) 3 SCR 1271 to hold that processed shrimps, prawns and lobsters were not a new and distinct commodity but they retained the same character as the original shrimps, prawns and lobsters even after the processing. It was, thus, held that the reliance on

the case of **Sterling Foods case** (supra) was misplaced. In this backdrop, it was observed that the crude oil does not at all retain its earlier characters after processing.

50. The Apex Court, so far as **Shiv Datt & Sons case** (supra) is concerned, ruled that the question therein was: whether the dealers were entitled to the concession provided in section 8 of the Act, of such part of their turnover as represented the resale of batteries purchased by them from a registered dealer. Interpreting the meaning of the word "resale" under section 2(26), and the word "manufacture" in the Act and the nature of process applied by the dealers before their sale, the Apex Court held that basically speaking the goods purchased by the dealers from the manufacturers as well as the goods sold by the former were one and the same. It was, thus, held that reliance place in **Shiv Datt & Sons** (supra) was also misplaced.

51. The Apex Court, thus, ruled that the case of **Tungabhadra Industries Ltd.** (supra) did not decide the issue as to whether process of refining amounts to "manufacture" or not.

52. The Apex Court after considering the meaning of the word processing as pointed out above,

reached to the conclusion that processing of oil did amount to "manufacture".

53. In the above view of the matter, we do not see any legal or constitutional infirmity in the amendment brought on the statute with retrospective effect. It is nothing but a clarificatory amendment which was necessary to take away the effect of the judgment of the Tribunal and in the facts and circumstances of the case. Thus, retrospective effect to the amendment was rightly given. In our considered view, all the contentions raised on behalf of the petitioners are devoid of any substance and the petition has no merit.

. In the result, the petition is dismissed. Rule is discharged with no order as to costs.

(J.P.DEVADHAR, J.) **(V.C.DAGA, J.)**